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Spanish jurisprudence,⁶ it is clear that courts of this state will not be bound by precedent in their solution of problems which may arise under it.

Upon principle it would seem that the putative wife is entitled to some part of the common property of the void union under all circumstances—assuming, of course, that the essential requisite of a putative marriage, namely, good faith, is present. Whether or not the court should go to the full extent of the Louisiana doctrine and divide the community property acquired during the putative marriage between the two women would depend upon the facts of the particular case. While it may be said that there are no equities in an heir, a situation in which such a division of the property would be an extremely harsh result can easily be imagined. For instance, to allow a lawful wife who had not obtained a valid decree of divorce but had again married and was the “*de facto*” wife of another, to assert claims in the common property held by her first husband to the exclusion of heirs or a putative wife of such husband would be to reach a result justifiable in logic, perhaps, but not otherwise.

In the last analysis the whole doctrine, it is submitted, is one based upon equitable considerations and, being based upon equitable considerations, it should be applied only with a view towards effecting substantial justice among the parties involved. Parties without standing in equity should be precluded upon equitable principles from asserting claims in the property in controversy until the rights of innocent parties have been fully taken care of.

W. C. B.

MUNICIPAL CORPORATIONS: RELATIVE SUPERIORITY OF SUCCESSIVE LIENS FOR STREET IMPROVEMENTS—In California cities expand rapidly. It is a common experience to witness, within a comparatively short time, the growth of a well-settled community in what was an orchard or wheat field. If, during the course of one of these characteristic transformations, successive contractors grade the streets, set the curbs, lay down sewers, pave the streets, construct cement sidewalks, plant trees, and erect elaborate electroliers, the common conceptions of business relations and property law would seem to indicate that these improvements should be paid for in the order of their initiation or completion; but the supreme and appellate courts have held that the liens of such contractors

⁶ See 9 California Law Review, 71. The doctrine of the putative marriage does not depend entirely upon its recognition by the Code Napoleon for its historical basis but is found in the canon law not earlier, however, than the twelfth century: Planiol, *Traité Élémén. de Droit Civil* (8th ed. 1920) § 1094. The dictum in the principal case that plaintiff “acquired no marital rights” is not, it is submitted, authority contra to the doctrine of *Schneider v. Schneider* (supra, n. 2).

rank inversely to their priority—that so far as payment is concerned, the last shall be first and the first last.¹

Except in cases of bottomry and *respondentia*, in receivership, and possibly a few other proceedings of a similar nature, different liens upon the same property have priority according to the time of their creation;² and this rule must govern unless, in any given case, a statute prescribes otherwise.³ In fact, it is thoroughly established that even a lien for general taxes is not entitled to rank ahead of pre-existing liens, whether such liens have been affixed by contract or by prior tax levy, unless the legislature has expressly provided that it shall so rank.⁴ It is only because of express statutory enactment that the rule of inverse priority is applied to liens for general taxes.⁵ Likewise, the priority of street assessment liens depends entirely upon statutes. If the same improvements were undertaken as private enterprises, the ordinary mechanics' liens would attach.⁶ But where the work is initiated as a public enterprise, the contractor acquires, upon the property benefited, a lien which subsists for two years,⁷ or, if bonds are issued, until the bonds are paid;⁸ and this lien, although inferior to the lien of general taxation,⁹ is, because the intention of the legislature has been "clearly manifested," superior to all liens acquired by personal contract, whether such liens be prior in time or not.¹⁰ It is not doubted that the legislature might, if it wished, grant to a street assessment lien superiority over prior street assessment liens;¹¹ but the question is to be decided not by what the legislature might have done but by what it did do. "The authorization for displacing an earlier lien must, under all the decisions, be found in a statute."¹²

¹ *Woodill & Hulse Electric Co. v. Young* (July 5, 1919) 58 Cal. Dec. 42, 182 Pac. 422; *Barber Asphalt Paving Co. v. Armstrong* (June 4, 1920) 32 Cal. App. Dec. 467, 191 Pac. 954.

² Cal. Civ. Code, § 2897.

³ *Guinn v. McReynolds* (1918) 177 Cal. 230, 232, 170 Pac. 421; *Mortgage Securities Co. v. Pfaffman* (1917) 177 Cal. 109, 169 Pac. 1033.

⁴ 2 *Cooley on Taxation* (3d ed.) p. 865; *Escondido v. Escondido Lumber etc. Co.* (1908) 8 Cal. App. 435, 439, 97 Pac. 197.

⁵ Prior to 1859 a lien for taxes was not superior to prior tax liens: *Cowell v. Washburn* (1863) 22 Cal. 519, 522. *Anderson v. Ryder* (1873) 46 Cal. 135, *Dougherty v. Henarie* (1873) 47 Cal. 9, and *Chandler v. Dunn* (1875) 50 Cal. 15 were decided on the express authority of a statute. See Cal. Stats. 1859, p. 349. *California Loan etc. Co. v. Weis* (1897) 118 Cal. 489, 50 Pac. 697 was decided in accordance with Cal. Pol. Code, §§ 3716, 3717, 3788.

⁶ *Warren v. Hopkins* (1895) 110 Cal. 506, 511, 42 Pac. 986; Cal. Code Civ. Proc. § 1191.

⁷ Act of March 18, 1885, § 9, Cal. Stats. 1885, p. 155.

⁸ Act of Feb. 27, 1893, § 4, Cal. Stats. 1893, p. 36.

⁹ *Dougherty v. Henarie*, *supra*, n. 5, at pp. 14 and 15.

¹⁰ *German Sav. etc. Soc. v. Ramish* (1902) 138 Cal. 120, 125, 69 Pac. 89; *O'Dea v. Mitchell* (1904) 144 Cal. 374, 381, 77 Pac. 1020; *Chase v. Trout* (1905) 146 Cal. 350, 365, 80 Pac. 81.

¹¹ 2 *Cooley on Taxation* (3d ed.) p. 866; *German Sav. etc. Soc. v. Ramish*, *supra*, n. 10; *Guinn v. McReynolds*, *supra* n. 3.

¹² *Guinn v. McReynolds*, *supra* n. 3.

In 1872 the legislature enacted, as to assessments for street improvements, "When . . . recorded the several amounts assessed shall be a lien upon the lands, lots, or portions of lots assessed, respectively, for the period of two years from the date of said recording, unless sooner discharged";¹³ and in 1885 these precise words were repeated in the Vrooman Act.¹⁴ In 1885 the Supreme Court, interpreting these words, held a junior street assessment lien to be inferior to a prior lien of the same sort;¹⁵ and in 1891, when it again had occasion to indicate the rights of competing holders of street assessment liens, the court said "As the liens under which plaintiff's title has its origin are older than the liens to which the deeds of defendants relate, the plaintiff has the superior legal title."¹⁶ It was generally considered that this decision had settled the law of California.¹⁷ In fact, in the acts of 1901, 1905, and 1909 the legislature recognized, in express words, the rule of these cases by providing that such assessments should be "a lien upon the real estate upon which they are imposed, paramount to all other liens, except prior assessments and general taxes."¹⁸ The Improvement Act of 1911, a combination of the earlier acts and an effort to simplify improvement procedure, was intended not to supplant the earlier acts, but as an alternative method for making such improvements.¹⁹ In phrasing this act, the legislature copied verbatim the words here quoted from the acts of 1872 and 1885.²⁰ Should not this be held to be an adoption of the interpretation placed on these words by the courts more than twenty years before? Is it not clear that the legislature meant the rule under this act to be, as the courts had held it to be, the same as that expressly laid down by the legislature in the acts of 1901, 1905, and 1909? Will it not lead to great inconvenience and confusion to have the priority of successive street assessment liens depend upon which of two "alternative" statutes is employed?

Public policy would seem to favor the rule that street assessment liens should rank according to their priority. This rule would place a natural restriction upon the making of successive assessments for special improvements. If each lien affixed be admitted as superior to all subsequent liens, no improvement can be undertaken and financed unless those financing it are convinced that the property can safely support the succeeding lien in addition to

¹³ Act of Apr. 1, 1872, § 10, Cal. Stats. 1871-1872, p. 814.

¹⁴ Act of Mar. 18, 1885, § 9, Cal. Stats. 1885, p. 155.

¹⁵ *Wood v. Brady* (1885) 68 Cal. 78, 5 Pac. 623.

¹⁶ *Brady v. Burke* (1891) 90 Cal. 1, 6, 27 Pac. 52.

¹⁷ The case is cited on this point in *Scott-McClure Land Co. v. Portland* (1912) 62 Ore. 462, 125 Pac. 276; in 35 L. R. A. 376, note; and in Ann. Cas. 1913C 1210, note.

¹⁸ Act of Feb. 26, 1901, § 22, Cal. Stats. 1901, p. 42; Act of Mar. 21, 1905, § 17, Cal. Stats. 1905, p. 569; Act of Apr. 21, 1909 § 12, Cal. Stats. 1909, p. 1049.

¹⁹ Act of Apr. 7, 1911, § 83, Cal. Stats. 1911, p. 768.

²⁰ Act of Apr. 7, 1911, § 23, Cal. Stats. 1911, p. 744.

the outstanding liens. On the other hand, under the rule laid down by the court, there is no restriction upon the imposition of successive liens. Any contractor who can instigate the inception of a new and unnecessary improvement will obtain a lien which supplants that of those who did the first and essential work. And the holders of prior liens and the bonds secured by such liens are without protection. In fact, the contractor who performed the first work can enforce his lien only by paying all contractors subsequent to him; and where the total cost of improvements is greater than the value of the property (as it probably would be in a disputed case) this is a privilege of doubtful value.²¹ The holder of a bond which declares itself to be "a first lien upon the property until the principal and the accrued interest thereon shall be fully paid" ²² may be surprised to learn that many subsequent liens are superior to his; and careful investors will not buy such bonds. Indeed the rule of the early cases, apparently adopted by the legislature, would seem to make for a much more sound and conservative policy of local improvement.

But, in *Woodill & Hulse Electric Company v. Young*,²³ the court discarded the statement from *Brady v. Burke* by declaring it to have been dictum,²⁴ and, recognizing that "the statute contains nothing governing the ranking of conflicting liens, each imposed under the statute," proceeded to determine such ranking "by the general principles applicable to liens of that character." "Such liens," said the court, "are essentially tax liens imposed by public authority for a public purpose upon a *res*, and the same compelling reasons which have led to the practically universal recognition of the rule that a subsequent lien for general taxes is superior to a prior lien of the same sort, lead to the same conclusion with regard to street assessment liens." The crux of the decision was the question "What reason is there for not applying to the case of conflicting street assessment liens the same rule . . . applied in the case of conflicting general tax liens?" It would seem that this is a question to be answered by the legislature, and that unless the legislature has expressly provided a different rule, the prior lien should prevail.

But the decision of the courts seems to be final. In *Woodill & Hulse Electric Company v. Young*²⁵ the Supreme Court refused a

²¹ The Improvement Bond Act of 1915, which provides an "alternate" system for the issuance of bonds, contains a provision that if there is no purchaser at a delinquent sale, the city must purchase. Act of June 11, 1915, § 12, Cal. Stats. 1915, p. 1448; Act of May 4, 1917, § 6, Cal. Stats. 1917, p. 213; but there has been no adjudication under this provision.

²² Act of Feb. 27, 1893, § 4, Cal. Stats. 1893, p. 35; Act of Apr. 7, 1911, § 63, Cal. Stats. 1911, p. 759.

²³ *Supra*, n. 1.

²⁴ In the petition for rehearing counsel urged vigorously that the statement was not dictum but that the court gave two distinct grounds for the decision, either of which would have been sufficient without the other.

²⁵ *Supra*, n. 1.

rehearing after considering the petitions and briefs not only of respondent but of amici curiae including attorneys representing "extensive holdings in special improvement assessments and bonds representing them" as well as the city attorneys of twelve California cities, all of whom opposed the rule laid down. And in *Barber Asphalt Paving Company v. Armstrong*²⁶ the District Court of Appeal relied upon the former case and a hearing by the Supreme Court was refused. Thus the rule seems to be that in proceedings to enforce street assessment liens, the last lien in point of time imposed, and sought to be enforced, is superior and paramount to all such other liens.²⁷ R. V.

PARTNERSHIP: INEFFECTIVENESS OF STIPULATION NOT TO BE PARTNERS, WHEN PARTNERSHIP IN FACT EXISTS—Can parties stipulate in an agreement that they shall not be partners, although by the self-same agreement they arrange for the contribution of labor, funds, and equipment to a common enterprise, and provide for the distribution of the profits? The decision in the case of *Streeter and Riddell v. Bacon*¹ affirms the rule that such a stipulation is of no avail to enable any of the parties to escape liability, if from the undisputed facts in the case a partnership can be deduced as a legal conclusion.

In this case, Bacon, the appellant, entered into a written contract with his son and one James, the latter two proposing to enter into the business of threshing beans, and the appellant agreeing to furnish them with certain equipment. The agreement provided that the appellant should be repaid by the others all the funds advanced by him, out of the gross receipts of the business, and that at the end of the season, after this charge and all other bills had been met, the net balance remaining should be divided by James and the appellant equally. There was further a written stipulation in very specific terms embodied in the agreement, stating that the parties were not thereby binding themselves as partners; that none of them would be liable to or for the others, on account of any obligations entered into, whether for joint benefit or not.

The plaintiff in the present action gave credit to James and the

²⁶ *Supra*, n. 1.

²⁷ Since each case must be determined by an interpretation of the statutes applicable, decisions from other jurisdictions are of little assistance here. Some jurisdictions have adopted the rule now laid down by our courts. *Morey v. Duluth* (1899) 75 Minn. 221, 77 N. W. 829; *Jaicks v. Oppenheimer* (1915) 264 Mo. 693, 175 S. W. 972. Other jurisdictions hold that the earlier of two street assessment liens should prevail. *Philadelphia v. Meager* (1871) 67 Pa. St. 345; *Des Moines Brick Mfg. Co. v. Smith* (1899) 108 Iowa 307, 79 N. W. 77; *Bell v. New York* (1901) 66 App. Div. 578, 73 N. Y. Supp. 298; *Brownell Improvement Co. v. Nixon* (1910) 48 Ind. App. 195, 92 N. E. 693, overruling *Burke v. Lukens* (1895) 12 Ind. App. 648, 40 N. E. 641, 54 Am. St. Rep. 539; *Scott-McClure Land Co. v. Portland*, *supra*, n. 17.

¹ (Sept. 20, 1920) 33 Cal. App. Dec. 197.